UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
v.	:	No. 2:05-CR-16
DAVID COX, Defendant.	:	

OPINION AND ORDER

The Defendant, David Cox, is charged with conspiracy and making false statements in connection with a renovation and expansion project undertaken by Fletcher Allen Health Care, Inc. Cox has filed a number of pretrial motions, and the Court held a hearing on these motions on March 7, 2006. For the reasons set forth below, Cox's motions to dismiss Counts One through Four (Doc. 19), Counts Two and Three (Doc. 15), Count Four (Doc. 53), and Count Five (Doc. 20), are DENIED. Cox's motion for a bill of particulars (Doc. 13) is DENIED. Cox's motions to suppress his deposition testimony and his interview testimony, and to dismiss the indictment (Docs. 16 and 14), are DENIED. Cox's motion to take depositions (Doc. 18) is DENIED. Cox's motion for disclosure of exculpatory evidence (Doc. 17) is GRANTED in part and DENIED in part. Cox's supplemental motion for disclosure of exculpatory evidence (Doc. 54) is DENIED.

BACKGROUND

A. The Renaissance Project

Fletcher Allen Health Care, Inc. ("Fletcher Allen" or "FAHC") is a nonprofit health care corporation based in Burlington, Vermont. David Cox served as Fletcher Allen's Chief Financial Officer between 1997 and 2001. During that time, he was involved in planning the Renaissance Project ("the Project"), also known as the Master Facility Plan (the "MFP"), which was a major expansion of Fletcher Allen's Medical Center Hospital of Vermont ("MCHV") campus in Burlington. This case arises out of allegations that members of Fletcher Allen's senior management, including Cox, made misrepresentations and false statements to conceal the true cost of the Project from Fletcher Allen's Board of Trustees ("BOT") and from state regulators.

Under Vermont law, hospital spending is regulated by the Vermont Department of Banking, Insurance, Securities, and Health Care Administration ("BISHCA"). Each Vermont hospital is required to submit its operating and capital budget to BISHCA each year. In addition, if a hospital intends to make a significant capital expenditure, it must receive approval from BISHCA in the form of a Certificate of Need (CON). Once a CON has been granted for a particular project, additional CON review is required if the originally budgeted cost of the project increases by a certain amount. According to the government, at

the time that the Project was in its planning stages, a CON was required for any new health care service that would result in a capital expenditure in excess of $1.5 million, and additional review was required if the original cost increased by 10% or $500,000, whichever was less.

In 1998, Fletcher Allen applied to BISHCA for a CON for the Project. As originally described, the Project included a new ambulatory care center, an education center, a parking garage, and various other additions and renovations to the existing facilities. Fletcher Allen represented in its CON application that the expected cost of the Project would be approximately $118 million. In April 1999, BISHCA approved the project and issued a CON.

Following the issuance of the CON, the cost of the Project increased substantially due to changes in its design and other factors. As a result, Fletcher Allen submitted an amended CON application in November 2000. Among the changes made in the amended application were the removal of the proposed parking garage from the projected Project cost. Fletcher Allen informed BISHCA that the garage would be constructed, owned, and operated by a third party, and hence that it was no longer subject to CON review. The amended application also stated that the total cost--not including the garage--had increased to approximately $173 million. BISHCA granted the amended CON in March 2001.

B. Cox's resignation and severance agreement

In July 2001, while the planning for the Project was still ongoing, Cox's employment at Fletcher Allen came to an end. According to Cox, he was terminated by Fletcher Allen's then-CEO William Boettcher as a result of recurring disagreements between the two men. The termination was publicly treated as a resignation.

In August 2001, Cox and Fletcher Allen entered into a Severance Agreement ("the Agreement") under which Cox would continue receiving his salary until October 2001. See Severance Agreement of Aug. 15, 2001, Ex. A to Doc. 14. Under the Agreement, Cox would also receive an additional $255,000 in severance pay, paid in bimonthly installments from November 2001 to October 2002. The payments set forth in the Agreement were contingent on a number of factors, including a representation and warranty by Cox that

> to the best of his knowledge, (i) during his term of employment at FAHC, he has complied with all Federal and State laws and regulations applicable to the payment and reimbursement of claims for hospital and/or professional services, including but not limited to the Social Security Act, and (ii) he is not aware of any past or current violations of such laws or regulations by any member, director, officer, employee or agent of FAHC that have not been subject to appropriate remedial action by FAHC.

Id. § 7.02. The Agreement gave Fletcher Allen the right to revoke Cox's severance payments in the event of a breach. Id. § 6.02.

On at least two occasions subsequent to the signing of the Agreement, Fletcher Allen considered the possibility of suspending Cox's severance payments. In the first incident, on November 8, 2001, Fletcher Allen informed Cox that it intended to suspend the payments because he had sought to have Fletcher Allen employees be contacted as employment references. Fletcher Allen took the position that this action had violated a provision of the Agreement prohibiting contact with certain Fletcher Allen personnel. After being contacted by Cox's attorney, however, Fletcher Allen reversed its position and allowed the payments to resume the next day. Subsequently, in July 2002, Fletcher Allen considered the possibility of suspending the severance payments after Cox made certain statements to BISHCA at a deposition in April 2002. On that occasion, Fletcher Allen was concerned that Cox may have violated a clause of the Agreement prohibiting him from disparaging Fletcher Allen, but it ultimately decided not to suspend the payments.

C. The BISHCA investigation and Cox's deposition

After Cox left Fletcher Allen, BISHCA began an investigation into whether Fletcher Allen had complied with the applicable regulations and laws in obtaining approval of the Project. The investigation initially focused on the issues surrounding the removal of the parking garage from the CON process. BISHCA was concerned that CON approval might have been required for the

garage due to the financing and leasing structure that had been employed to fund its construction and operation.

In the course of its investigation, BISHCA subpoenaed Cox to testify at a deposition under oath. Fletcher Allen moved in Washington Superior Court to quash the subpoena on the ground that Cox's testimony might infringe its attorney-client privilege. A hearing on the motion took place on April 2, 2002 before the Hon. Alan Cheever. Cox was not present, although an attorney who had previously represented Cox was contacted at Judge Cheever's request and listened to part of the hearing via speaker phone. At the hearing, Judge Cheever expressed concern over whether Cox's rights would be protected if he were compelled to testify. Clifford Peterson, counsel for BISHCA, stated that the investigation "had nothing to do with criminal activity." Tr. of Hearing on Mot. to Quash at 20, Ex. B. to Doc. 16. Judge Cheever asked, "what is the potential risk for Mr. Cox if he testifies?", and Peterson stated that "Mr. Cox has no exposure from the Banking and Insurance Department." Id. at 37-38. After considering counsel's arguments and representations, Judge Cheever permitted the deposition to go forward on the condition that Cox be given an opportunity to consult with counsel beforehand.

The deposition took place the following day, on April 3, 2002. Cox attended without an attorney, and he was asked if he

was represented by counsel. He replied, "I'm not currently represented by counsel. I have received previous legal advice regarding this deposition, and I'm satisfied at this point that I do not need legal counsel." Tr. of Dep. of David Cox at 4, Ex. A to Doc. 16. The deposition then went forward. Cox testified under oath about various aspects of the Renaissance Project, with a particular focus on the parking garage issue.

D. Cox's interview with the United States Attorney's office

After BISHCA initiated its investigation, the United States Attorney's office and the Vermont Attorney General's office began their own investigation into potential wrongdoing by Fletcher Allen management. As part of this investigation, Cox participated in an interview on August 20, 2002, with Assistant United States Attorney ("AUSA") Michael Drescher, Vermont Assistant Attorney General John Treadwell, and attorneys R. Jeffrey Behm and Peter Zamore. Behm and Zamore appeared on behalf of Fletcher Allen's Ad Hoc Committee, which was conducting its own investigation into the growing controversy over the Renaissance Project. Cox was accompanied by counsel, and he was not placed under oath.

At the beginning of the interview, Mr. Drescher stated that "we understand that you have agreed to voluntarily sit down with us," and Cox expressed no disagreement with this statement. Cox went on to answer questions about his severance agreement and

various matters involving the Renaissance Project. On certain occasions, he opted not to answer questions, and on others, he was directed not to answer by counsel for Fletcher Allen on the ground that answering would reveal privileged information.

E. The charges against Cox

The government's investigation ultimately led to criminal charges against several former Fletcher Allen officers, including Cox. In short, the government alleges that when the cost of the Renaissance Project began to increase, Cox and other members of Fletcher Allen's senior management engaged in a conspiracy to withhold the true cost from BISHCA and from the BOT in order to avoid further review and to minimize the possibility that the Project would not receive the necessary approval. The government also alleges that Cox and others made false statements about the cost of the Project to BISHCA, to the BOT, and to a bank from which Fletcher Allen was seeking to borrow money.

An Indictment was filed on February 3, 2005, charging Cox with one count of conspiracy in violation of 18 U.S.C. § 371, three counts of making false statements in a matter involving a health care benefit program in violation of 18 U.S.C. § 1035, and one count of making false statements in connection with a loan application in violation of 18 U.S.C. § 1014. On September 13, 2005, a Superseding Indictment was filed modifying some of the

allegations in the Indictment.[1] Like the original Indictment, the Superseding Indictment charged Cox with one count under Section 371, three counts under Section 1035, and one count under Section 1014.

Count One of the Superseding Indictment alleges that Cox conspired "with others known and unknown to the grand jury" to violate Section 1035 by covering up material facts and making materially false statements in a matter involving a health care benefit program. Superseding Indictment at 6. The individuals mentioned by name in Count One are Cox, Boettcher, and former Fletcher Allen vice president David Demers.

Count One alleges that the object of the conspiracy was to conceal the true cost of the Renaissance Project from BISHCA and the BOT. It alleges that the conspirators decided that in order to maximize the chances of CON approval, the amount of capital costs that would be reported to BISHCA should be capped at $173 million, and any additional costs should be hidden from BISHCA and the BOT. It alleges that the conspirators refused to update the $173 million figure even after they were aware that the cost would be as much as $80 million in excess of that figure. It

[1] In particular, the Superseding Indictment added language to Count Three alleging that Cox's conduct was in connection with the delivery of and payment for health care benefits, items, or services. It also replaced the allegations in Count Four, which related to false statements about the proposed education center, with allegations of a different violation of Section 1035 involving concealment from BISHCA.

alleges that they used various techniques to conceal the additional costs, including understating costs, falsely classifying costs as routine capital costs, falsely representing the date of planned costs, and engaging in a "shell game" by labeling the same costs in different ways depending on which type of cost was under regulatory scrutiny. Count One alleges a number of specific "overt acts" taken in furtherance of the conspiracy. The acts listed consist of allegedly false and misleading statements made by Cox, Demers and other conspirators to BISHCA officials and members of the BOT.

Counts Two through Four allege that Cox violated Section 1035 by engaging in concealments and making material false statements to BISHCA and the BOT. Count Two alleges that Cox falsely told BISHCA that the cost of the Project was $173 million, and that planned routine capital costs between 2001 and 2006 would be $253 million. Id. at 14. Count Three alleges that Cox presented a PowerPoint slide to the BOT Finance Committee falsely stating the costs of the MFP for 2001, 2002, 2003, and 2004. Id. at 15. Count Four alleges that Cox concealed from BISHCA the fact that Project costs exceeded the amount approved in the March 2001 CON, and that he falsely represented that expenditures totaling $69.3 million in fiscal year 2002 had been "previously approved." Id. at 16.

Count Five alleges that Cox violated Section 1014 by

submitting a financing application to Chase Manhattan Bank that contained false statements. It alleges that Cox was aware that costs for the Renaissance Project has increased beyond the original budget, and that he "falsely described [to Chase Manhattan] the planned capital spending on the building project and total capital spending over the period 2000 through 2004." Id. at 18.

Cox pled not guilty to all charges. Currently before the Court are Cox's motions to dismiss Counts One through Four, Counts Two and Three, Count Four, and Count Five; for a bill of particulars; to suppress his BISHCA deposition testimony and his interview testimony, and to dismiss the indictment; to take depositions; and for disclosure of exculpatory evidence.

DISCUSSION

I. COX'S MOTION TO DISMISS COUNTS ONE THROUGH FOUR

Count One through Four of the Superseding Indictment allege that Cox violated or conspired to violate 18 U.S.C. § 1035. That statute provides, in relevant part:

> (a) Whoever, in any matter involving a health care benefit program, knowingly and willfully--
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,

> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1035(a). Cox moves to dismiss Counts One through Four[2] pursuant to Fed. R. Crim. P. 12(b) on the ground that they fail to allege conduct that is actionable under Section 1035. He argues that the counts do not allege facts supporting an essential element of the offense, namely that the alleged conduct was committed "in connection with the delivery of or payment for health care benefits, items, or services."

As noted above, Counts One through Four allege that Cox made and conspired to make false statements to state regulators and the BOT about the cost of the Renaissance Project. The Superseding Indictment purports to identify the requisite connection between these statements and the delivery and payment of health care services through allegations that the Project was "to be used for the delivery of health care benefits, items and services," and that "the decision to spend hundreds of millions of dollars on the Renaissance Project affected FAHC's ability to spend capital on other health care related matters[.]"

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[2] Cox's motion was addressed to Counts One through Four of the original Indictment. After the government obtained the Superseding Indictment, Cox indicated that in his view, the corresponding counts of the Superseding Indictment suffered from the same defect as the corresponding counts in the Indictment. Reply to Opp. to Mot. to Dismiss Counts One through Four at 2 n.1 (Doc. 44). Accordingly, the Court will consider Cox's arguments as they apply to Counts One through Four of the Superseding Indictment.

Superseding Indictment at 5. It also alleges that the Project was to be funded, both directly and indirectly, by "revenues generated from health care benefits, items and services[.]" Id.

Cox contends, however, that these allegations fail to establish the type of connection required by Section 1035. In Cox's view, Section 1035 prohibits only false statements that have a direct connection to specific health care benefits, items, or services, such as a doctor's submission of a bill for a medical procedure that was never performed. The false statements alleged in the Indictment merely relate to a construction project, he notes, and the fact that that project may in turn have been connected in a general sense to health care services fails, in his view, to establish a sufficiently direct connection.

In construing the language of Section 1035, the Court begins with the "fundamental principle of statutory construction that the starting point must be the language of the statute itself." Morenz v. Wilson-Coker, 415 F.3d 230, 234 (2d Cir. 2005); see also United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (where the language of a statute is plain, "the sole function of the courts is to enforce it according to its terms"). Cox's suggestion that the statements must be connected to *specific* health care services, however, would violate this well-established principle by adding a restriction that is nowhere in

the text of the statute. The statute refers in general terms to "the delivery of or payment for health care benefits, items, or services," with no requirement that the statements be tied to specific billings or services.

Cox's reading is also at odds with case law adopting a broad reading of the words "in connection with." Although courts do not appear to have interpreted the phrase "in connection with the delivery of or payment for health care benefits, items, or services" in the particular context of Section 1035, the closely related health care fraud statute, 18 U.S.C. § 1347, uses the very same language. In United States v. Baldwin, 277 F. Supp. 2d 67 (D.D.C. 2003), the defendants argued that Congress had intended to limit Section 1347 to fraud against reimbursement mechanisms such as Medicare and Medicaid. Rejecting this attempt to limit the scope of Section 1347 to "particular species of health care fraud," the court held that "the language Congress chose is consistent with an intent to combat health care fraud without limitation." Id.

Courts have been hesitant to adopt a narrow reading of the phrase "in connection with" in other legal contexts as well. See, e.g., Press v. Chem. Inv. Servs. Corp., 166 F.3d 529, 537 (2d Cir. 1999) (noting that the Second Circuit has read "in connection with" broadly in the securities context); United States v. Loney, 219 F.3d 281, 284 (3d Cir. 2000) (interpreting

federal sentencing guidelines for possessing a firearm in connection with a felony offense "as covering a wide range of relationships"). This is consistent with the dictionary definition of the word "connection," which the American Heritage Dictionary, Fourth Edition, simply defines as "an association or relationship."

It is true, of course, that at some point a connection becomes so attenuated as to be meaningless. For this reason, courts have held that the phrase "in connection with" implies some sort of logical or "reasoned link," as opposed to a purely coincidental association. United States v. Thompson, 32 F.3d 1, 5-6 (1st Cir. 1994); accord United States v. Shepardson, 196 F.3d 306, 315 (2d Cir. 1999).

Taking the above principles into consideration, the Court is satisfied that the Superseding Indictment identifies a sufficient connection between the alleged false statements and the delivery of and payment for health care benefits, items, and services. It alleges that the Project was funded by proceeds from the delivery of health care, that the new facility would itself be used to deliver health care services, and that increases in the Project's costs would require the diversion of funds that would otherwise be spent on patient care. The Superseding Indictment also makes clear that the association between the statements and the health care services in question is not a mere coincidence, but rather a

direct logical relation. It alleges that Cox and other Fletcher Allen officers made false statements about the Project's cost to entities whose approval was essential to its completion. It cannot be disputed that the alleged false statements, if true, were likely to have an impact on the delivery of and payment for health care. For this reason, the conduct alleged in Counts One through Four falls squarely within the text of the statute.

Cox argues that if the allegations in the Indictment are deemed to satisfy the "in connection with" element of Section 1035, that element will be rendered superfluous. This concern is unfounded. Even when given a broad reading, the "in connection with" language restricts the statute's scope to falsehoods that are logically connected to health care delivery and payment. Thus, as the government points out, a hospital employee who falsely denied having a relationship with a co-worker would violate all other elements of Section 1035, but this conduct would not meet the "in connection with" element because it would have nothing to do with the delivery of or payment for health care.

Cox argues that Section 1035 has never been held to apply to the type of conduct alleged in the Indictment. In support of his contention that the statute requires a direct connection to specific health care services, he cites a number of cases that involved a more direct connection than the instant case. See,

e.g., United States v. Canon, 141 Fed. Appx. 398, 401 (6th Cir. 2005) (doctor charged with billing for one procedure when he had administered another); United States v. Birkin, 366 F.3d 95, 97 (2d Cir. 2004) (scheme to stage accidents and bill insurance companies for concocted injuries). These cases shed more light on how prosecutors have chosen to exercise their discretion, however, than on the outer bounds of the statute. Furthermore, some Section 1035 prosecutions have involved conduct with no direct connection to specific services. For example, in United States v. Walley, No. 03-CR-143-S, 2004 WL 212912 (W.D. Wis. Jan. 29, 2004), the defendant was charged with concealing from the nursing home where he worked the fact that his nursing license had been suspended and that he had been excluded from federal health care programs. Similarly, in United States v. Syme, 276 F.3d 131, 140 (3d Cir. 2002), the defendant was charged under Section 1035 with falsely stating, in a letter concerning an application for a Medicare provider number, that he was not involved in the management of an ambulance service. In neither Walley nor Syme is there any indication that the alleged false statements had a direct connection with specific, identifiable health care services.

Cox also points to the legislative history of Section 1035 as support for his narrow reading of the statute. Because the text of the statute is not ambiguous, there is no need to

consider the legislative history. See United States v. Ford, 435 F.3d 204, 210 (2d Cir. 2006) ("Only where the language of a statute is ambiguous may we look to legislative history and purpose in interpreting it."). In any event, nothing in the history supports Cox's view that Congress did not intend to criminalize the type of conduct alleged in the Superseding Indictment. Section 1035 was passed as part of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (1996). The conference report on the bill states that one of its intended purposes was "to combat waste, fraud, and abuse in health insurance and health care delivery[.]" Introduction to H.R. Conf. Rep. 104-736 (1996). Although Cox suggests that the allegations in the Indictment fall outside of this description, statements that falsely understate the cost of a hospital project have an obvious potential to contribute to waste, fraud, and abuse in health care delivery.

Cox also cites language in a House committee report issued prior to the enactment of HIPAA which discussed the need for health care fraud legislation. See Congressman William Clinger, Heath Care Fraud: All Public and Private Payers Need Federal Anti-Fraud Protections, H.R. Conf. Rep. 104-747 (1996) ("Clinger Report"). In the Clinger Report, the committee listed a number of examples of health care fraud that, in its view, should be prohibited by federal legislation. See, e.g., id. at 8-9

(describing schemes to bill for unnecessary or undelivered services, staged automobile accidents, and other similar examples). Cox correctly observes that these examples are primarily variations on fraudulent billing schemes, and that the conduct of which he is accused falls outside of that category. Merely because a committee expressed a desire to include a particular type of health care fraud within the scope of the bill, however, does not compel the conclusion that the subsequently enacted statute was limited to the cited examples. In fact, if Congress had intended to limit HIPAA's anti-fraud provisions to the examples cited in the Clinger Report, it would have been sufficient to enact Section 1347, which prohibits schemes to defraud; there would have been no need to enact Section 1035, which by its express terms covers a much broader range of false statements.

Cox also points to a recommendation in the Clinger Report that anti-fraud legislation should not apply to "illegal remuneration, bribery or graft" in the context of private payers, and he argues that the conduct alleged in the Indictment falls into this category. Even assuming arguendo that Congress did not intend Section 1035 to apply to false statements made in connection with illegal remuneration, bribery, or graft, however, the Superseding Indictment contains no allegations of these activities. Indeed, there is no suggestion that the alleged

crimes of Cox or any of his co-conspirators were motivated by financial gain.

Finally, Cox argues that under the rule of lenity, the Court must construe Section 1035 against the government and in favor of Cox's interpretation. "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." United States v. Lanier, 520 U.S. 259, 266 (1997). This argument, too, must fail, because as noted above, the statute is not ambiguous. Cox's reading of Section 1035 is not one of many reasonable interpretations, but rather an attempt to read a restriction into the statute that is nowhere in the text. Here, the statute made clear that it was illegal to make false statements or concealments in connection with the delivery of or payment for health care services. Because the allegations in the Superseding Indictment, if true, establish a clear connection to health care, it was "reasonably clear at the relevant time that the defendant's conduct was criminal," id. at 267, and the rule of lenity has no application.

Because the Superseding Indictment alleges conduct that falls within the unambiguous text of Section 1035, and because nothing in the legislative history compels a contrary interpretation of the text, the Court must reject Cox's argument for dismissal of Counts One through Four.

II. COX'S MOTIONS TO DISMISS COUNTS TWO AND THREE AND COUNT FOUR

Cox has filed motions challenging Counts Two, Three, and Four as impermissibly duplicitous.[3] Each of these counts follows a similar pattern, alleging that Cox "did knowingly and willfully cover up by trick, scheme and device a [particular] material fact," and that he "did knowingly and willfully make [particular] materially false, fictitious and fraudulent statements and representations." In Cox's view, because each of these counts alleges two separate wrongs, namely a concealment and a false statement, the Superseding Indictment violates the requirement of Fed. R. Crim. P. 8(a) that each offense be charged in a separate count.

To demonstrate impermissible duplicity, Cox must show (1) that the challenged counts combine more than one crime in a single count, and (2) that he is prejudiced thereby. United States v. Sturdivant, 244 F.3d 71, 75 (2d Cir. 2001). He must also demonstrate the inapplicability of an exception to the duplicity doctrine under which "acts that could be charged as separate counts of an indictment may instead be charged in a

[3] Cox's first motion, filed on August 10, 2005, addressed Counts Two and Three of the Original Indictment. On November 1, 2005, after the government obtained the Superseding Indictment, Cox filed his second motion. He argued that while the original Count Four had not raised a duplicity issue, the new Count Four was subject to the same challenge as Counts Two and Three. Because both motions raise essentially the same argument, the Court will consider Cox's arguments as they relate to all three of the challenged counts.

single count if those acts could be characterized as part of a single continuing scheme." United States v. Tutino, 883 F.2d 1125, 1141 (2d Cir. 1989).

A. The Tutino exception

The first obstacle to Cox's argument is that the challenged counts fall within the exception expressed in Tutino. This exception applies where the Indictment contains a conspiracy count, and where all of the crimes alleged in the challenged count fall within the scope of the conspiracy. For example, in Tutino itself, the Second Circuit held that two separate drug sales could be alleged in a single count because the defendants "were involved in an ongoing and continuous drug conspiracy, and . . . the two sales were part of a single continuing scheme." Id.; cf. Sturdivant (noting that "[o]nly after the court dismissed the conspiracy count at the close of the government's case did Count II take on a potentially impermissible duplicitous character").

Like Tutino, this case contains a conspiracy count, and the separate acts alleged in the challenged counts are plainly within the scope of the alleged conspiracy. Count One alleges that the conspiracy covered the period from early 2000 through mid 2002, and that the objects of the conspiracy included concealing the true cost of the Project from BISHCA and the BOT and making false statements regarding the cost of the Project to BISHCA and the

BOT. Superseding Indictment at 6-7. The allegations in Counts Two, Three, and Four fall squarely within this description. Not only that, several of the alleged acts in furtherance of the conspiracy listed in Count One consist of exactly the same conduct alleged in Counts Two through Four.

Cox attempts to distinguish this case from Tutino by suggesting that the Indictment does not allege a single scheme. He characterizes the original Indictment as alleging two schemes: one to cover up Renaissance Project costs and one to cover up Education Center costs. Even assuming that these alleged schemes were separate, the fact that the Education Center allegations have been dropped from the Superseding Indictment disposes of Cox's objection.

Cox also notes that the word "scheme" appears in only one subsection of Section 1035, and that the statute does not contemplate a scheme to make false statements or to use false documents. Tutino uses the word "scheme," however, to refer to the overarching conspiracy, not to the crimes committed in furtherance of that conspiracy. At the facts of Tutino itself demonstrate, the underlying offense need not be a "scheme," as long as it is part of a larger conspiracy.

Because Counts Two, Three, and Four each allege only acts that "could be characterized as part of a single continuing scheme," Cox's duplicity argument is foreclosed by Tutino.

B. Whether Counts Two through Four allege multiple crimes

Cox's duplicity argument would still be unavailing even if the allegations in Counts Two through Four did not fall within the Tutino exception, because he would be unable to demonstrate that each count alleged two distinct crimes.

In arguing that Section 1035 sets forth two separate crimes, Cox relies primarily on United States v. Hinman, No. CR04-4082, 2005 WL 958395 (N.D. Iowa Apr. 22, 2005). Unlike this case, Hinman involved a challenge to an indictment based on multiplicity, as opposed to duplicity.[4] The defendants challenged two counts which alleged violations of Section 1035: one count alleged that they had concealed the fact that a nursing home resident had fallen and been injured, while the second accused them of falsely stating to a government surveyor that they had disclosed all residents' injuries. Rejecting the defendants' argument, the court held that the two alleged violations of Section 1035 were not the same offense for multiplicity purposes. Hinman, 2005 WL at *15. Cox suggests that if Hinman's holding is imported into the duplicity context,

[4] Despite the similarity of the terms, duplicity and multiplicity are analytically distinct concepts. A duplicitous indictment is one that "joins two or more distinct crimes in a single count." Sturdivant, 244 F.3d at 75 n.3. An indictment is multiplicitous, by contrast, if it "charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." United States v. Chacko, 169 F.3d 140, 145 (2d Cir. 1999).

it will compel the conclusion that Section 1035 defines two separate crimes that cannot be joined in one count.

Hinman is of no assistance to Cox, however. Although the court did appear to characterize Subsections (a) and (b) or Section 1035 as "two separate offenses," see id. at *15, it did not purport to apply this holding to the duplicity context. The multiplicity and duplicity inquiries are not necessarily opposite sides of the same coin; each focuses on different limitations on the government's power to craft an indictment. The holding of Hinman, in essence, is that multiple violations of Section 1035 *may* be charged in separate counts, not that they *must* be.

Of considerably more relevance to Cox's duplicity argument is the Second Circuit's recent decision in United States v. Stewart, 433 F.3d 273 (2d Cir. 2006), in which it rejected the position advanced by Cox in the context of the closely related general false statements statute, 18 U.S.C. § 1001. Like Section 1035, Section 1001 makes it a crime to falsify, conceal or cover up a material fact; to make a materially false statement; or to make or use a document containing a materially false statement. In Stewart, the court held that "[t]he several different types of fraudulent conduct proscribed by section 1001 are not separate offenses, as [defendant] suggests; rather they describe different means by which the statute is violated." Stewart, 433 F.3d at 319. Because "an indictment is not defective if it alleges in a

single count . . . the commission of a crime by several means," United States v. Crisci, 273 F.3d 235, 238-39 (2d Cir. 2001), the indictment in Stewart was not duplicitous even though it charged multiple types of fraudulent conduct.

Although Cox argues that a different analysis should apply to Sections 1001 and 1035, he presents no compelling justification for making such a distinction. The text of the two statutes demonstrates that Section 1035 was closely modeled on Section 1001. Aside from the obvious difference in the two statutes' jurisdictional elements, the only difference is that Section 1035 consolidates Section 1001's three subsections into two. Given that the Stewart court found the three-subsection structure of Section 1001 to state a single offense, however, there is no logical basis for treating Section 1035 as stating multiple offenses.

C. Whether Cox would be prejudiced by the challenged counts

Finally, Cox has made no showing that he would be prejudiced if his case went to trial on the Superseding Indictment. He suggests that because they combine multiple allegations, the challenged counts are not sufficiently clear to enable him to understand the charges against him. The Court disagrees. Counts Two, Three, and Four clearly identify and distinguish between the acts that form the basis for each alleged means of violating Section 1035. For example, Count Two alleges that Cox

> did knowingly and willfully conceal and cover up by trick, scheme and device, a material fact from BISHCA, *namely the true capital cost to FAHC of the Renaissance Project*, and did knowingly and willfully make materially false, fictitious and fraudulent statements and representations to BISHCA, *namely that the MFP costs were $173 million (including capitalized interest) and that planned routine capital costs between 2001 and 2006 totaled $253 million*[.]

Superseding Indictment at 14 (emphasis added). Given this high degree of clarity, the fact that each count alleges more than one means does not place an undue burden on Cox's ability to understand the charges.

Cox also argues that if he is convicted on one of the challenged counts, he will be at risk of double jeopardy because he will not know which of the alleged acts formed the basis of the jury's verdict. This concern, however, can easily be addressed by the use of a special verdict form, which is frequently used in the case of indictments alleging multiple means of violating a statute.

To summarize, Cox's duplicity challenge to Counts Two through Four must fail because these counts fall within the Tutino exception to the duplicity doctrine. Furthermore, even if that exception were inapplicable, Cox would still fail to satisfy either element of the test for impermissible duplicity. Because none of the counts alleges more than one crime, and because he had not demonstrated a risk of prejudice, his argument must be rejected.

III. COX'S MOTION TO DISMISS COUNT FIVE

Cox moves to dismiss Count Five of the Indictment pursuant to Fed. R. Crim. P. 12(b), arguing that it is insufficiently specific.

A. Legal standard for dismissal

Challenges to the sufficiency of an indictment are addressed according to a well-established set of principles. "An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992). Although in general, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime," id., the Supreme Court has cautioned that "where the definition of an offence . . . includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,--it must descend to particulars." Russell v. United States, 369 U.S. 749, 764-65 (1962); see also Hamling v. United States, 418 U.S. 87, 118-19 (1974) ("Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will

inform the accused of the specific offence, coming under the general description, with which he is charged.").

B. Whether Count Five is sufficiently specific

Count Five of the Superseding Indictment alleges that Cox was working to secure bond financing for the Project. It alleges that he was aware by early 2000 that the cost of the Project was "tens of millions of dollars more than previously approved," and that disclosure of this higher cost "could adversely affect the bond financing plan." Superseding Indictment at 17. It then alleges that

> [i]n or about February 2000, in the district of Vermont and elsewhere, defendant DAVID COX did knowingly make a false statement for the purpose of influencing in any way that action of Chase Manhattan Bank, an institution the accounts of which were insured by the Federal Deposit Insurance Corporation, upon an application, commitment and loan, namely a bond liquidity facility in the amount of $50 million, in that COX falsely described the planned capital spending on the building project and total capital spending over the period 2000 through 2004.

Superseding Indictment at 17-18. Cox seeks dismissal of Count Five for lack of specificity.[5] According to Cox, the indictment is deficient in that it does not identify, among other things, what the false statement was, why it is alleged to be false, or when it was made.

[5] Although Cox's motion was addressed to Count Five of the Indictment, he has indicated that in his view, Count Five of the Superseding Indictment suffers from the same deficiency as the original Count Five. Accordingly, the Court will consider Cox's arguments as they apply to Count Five of the Superseding Indictment.

Count Five easily satisfies the requirement that an indictment "inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events," Stavroulakis, 952 F.2d at 693. It alleges that Cox made a false statement; it explains that the statement concerned the planned spending on the building project; it identifies the target, Chase Manhattan Bank; and it specifies the approximate date and location. This is an adequate explanation of the charges. Cox cites no authority for the proposition that an indictment must include the detailed information he seeks, such as the exact date of the statement or the specific individual to whom it was directed.

Although Cox professes to be perplexed as to what about the statement is alleged to be false, it is readily apparent from the second paragraph of Count Five that the alleged falsity involved an understatement of the Project's true cost. As that paragraph explains, Cox was allegedly aware that the cost of the Project had escalated and that financing could be adversely affected if he disclosed the higher cost. In this context, the only logical interpretation of the following paragraph is that the alleged false statement consisted of an inaccurately low estimate of the project's cost.

Because Count Five is sufficiently detailed to meet the requirements of Fed. R. Crim. P. 7(c)(1) and the Constitution's

Indictment Clause, Cox is not entitled to dismissal of that count.

IV. COX'S MOTION FOR A BILL OF PARTICULARS

Cox has filed a motion for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). The purpose of a bill of particulars is to "identify with sufficient particularity the nature of the charge pending against [the defendant], thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987).

The decision to order a bill of particulars rests in the sound discretion of the district court. Id. However, "the court should not order the filing unless the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he [or she] is accused." United States v. Biaggi, 675 F. Supp. 790, 809 (S.D.N.Y. 1987). A bill of particulars is not intended as a means of obtaining "disclosure of evidentiary detail" or disclosure of the government's "legal theory or the details of how it intends to prove the charges." United States v. Hunter, 13 F. Supp. 2d 586, 590 (D. Vt. 1998). In addition, no bill of particulars is necessary "if the information sought by defendant is provided in the indictment or in some acceptable alternate form[.]" United States v. Barnes,

158 F.3d 662, 665 (2d Cir. 1998).

In a letter dated May 10, 2005, Cox wrote to the government detailing thirty-one specific requests for particulars. See Ex. A to Doc. 13. He has summarized those requests as follows:

> (1) details about the alleged conspiracy including its date range, identities of alleged co-conspirators, when each entered and -- if applicable -- exited the conspiracy; (2) duties of other specific FAHC executives and alleged co-conspirators with regard to the Project; (3) specific information about allegedly false statements made by Mr. Cox and alleged co-conspirators to various agencies and unidentified "outsiders" both at meetings and at other, unspecified times; (4) specific information about BISHCA's regulatory authority and responsibility; (5) identification of the Vermont law that the government alleges Mr. Cox and others violated by failing to seek CON review; (6) identification of and information about the "millions of dollars" of fees and costs that the government alleges were miscategorized, unaccounted for, and lied about in the Project budget; (7) information about how the Project expenses affected FAHC's ability to spend on other health care related matters; (8) the identities of individuals at BISHCA that the government alleges had an understanding about total Project costs; and (9) specific information with regard to overt acts attributed to Mr. Cox and others.

Doc. 13 at 2. The government responded to Cox's letter on May 13, 2005. See Ex. B to Doc. 13. It provided answers to some of his questions; it referred Cox to other sources, such as the discovery materials it had previously turned over; and it indicated that it did not feel obligated to provide many of the requested details.

The Court is of the view that a bill of particulars is unwarranted. The government has provided Cox with ample details about the charges against him. To the extent that some of Cox's

requests have not been addressed by the government, those requests go well beyond the proper scope of a bill of particulars and amount to requests for discovery.

The adequacy of the government's disclosure is demonstrated by the Superseding Indictment itself, which describes the case against Cox in significant detail. It sets forth the background and context of the alleged conspiracy, numerous acts allegedly taken in furtherance of the conspiracy, and the specific false statements and concealments of which Cox is accused.

In addition to the Indictment, Cox has either received or been directed to substantial additional information about the government's case. For example, government counsel met with Cox and his attorneys and presented a PowerPoint slide presentation summarizing the evidence they intended to use against him. The government provided Cox with grand jury transcripts and other information it used to build its case. It also represented to Cox that he could rely on the sentencing memorandum in the case against former CEO Boettcher as an indication of the evidence and theories it would use in his case. Cox takes issue with the notion that a memorandum from a different case could provide him with adequate notice of the case against him. The Court sees no reason, however, why the government should be precluded from referring Cox to an already-existing document, provided that it represents that he can rely on the information it contains.

The Court has reviewed each of Cox's requests, and in each case, it is satisfied that the government has provided all of the detail required by the law. For example, as to Cox's first request, the government has provided the approximate dates of the conspiracy, and it has identified the key players in the alleged conspiracy by directing Cox to the Boettcher memorandum's identification of Boettcher, Cox, Krupka, Demers, and Keelty. Cox has not established that his defense will be unduly hampered if he is not provided with the highly specific level of detail he requests.[6]

As to Cox's request for more specific identification of the various false statements he is alleged to have made, the Indictment sets forth substantial information about these allegations, and this has been supplemented by extensive detail in the Boettcher memorandum and other documents. Other requested details, such as the information Cox requests about Vermont law and BISHCA's authority, is only tangential to the charges in the case, and in any event, it is readily available as a matter of

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[6] Cox cites United States v. Nachamie, 91 F. Supp. 2d 565 (S.D.N.Y. 2000) and United States v. Falkowitz, 214 F. Supp. 2d 365 (S.D.N.Y. 2002) in support of his argument that the government should be obligated to provide an exhaustive list of *all* alleged co-conspirators. The factors that those courts relied on in granting such relief are not present here, however. In both cases, the alleged conspiracies were more wide-ranging and involved a larger number of participants. See Nachamie, 91 F. Supp. 2d at 573; Falkowitz, 214 F. Supp. 2d at 391. Here, in the Court's view, it is sufficient that the major participants in the alleged conspiracy have been identified.

public record.

Because the Court concludes that Cox has received sufficient disclosure to enable him to understand the charges against him, it declines to exercise its discretion to order a bill of particulars. Accordingly, Cox's motion must be denied.

V. COX'S MOTIONS TO SUPPRESS TESTIMONY AND DISMISS THE INDICTMENT

Cox has filed two motions seeking suppression of testimony and dismissal of the Indictment. In each case, he argues that certain testimony is inadmissible, and that because the government's subsequent investigation was based on that testimony, the entire Indictment should be dismissed.

A. Cox's motion to suppress BISHCA testimony

Cox moves to suppress the testimony he gave to BISHCA at his deposition on April 3, 2002, arguing that he received a grant of immunity in exchange for testifying. He also argues that because the federal government relied on his purportedly immunized testimony in conducting the investigation that led to the charges against him, the entire indictment must be dismissed.

It is well established that "[t]he government may compel an individual to give self-incriminating testimony only by granting him an immunity that is at least as extensive as the privilege against self-incrimination conferred by the Fifth Amendment." United States v. Nanni, 59 F.3d 1425, 1431 (2d Cir. 1995) (citing Kastigar v. United States, 406 U.S. 441, 449 (1972)). Cox argues

that because he appeared at the BISHCA deposition pursuant to a subpoena, BISHCA compelled him to testify, thereby incurring an obligation to grant an immunity. Cox goes on to argue that BISHCA in fact granted him a broad immunity. As evidence of this, he cites statements made by BISHCA's attorney, Mr. Peterson, at the hearing on the motion to quash.

Cox's first contention, that he was "compelled" to testify by the BISHCA subpoena, confuses the concepts of being compelled to appear at a deposition, on one hand, and being compelled to incriminate oneself, on the other. In Minnesota v. Murphy, 465 U.S. 420 (1984), the Supreme Court emphasized that a witness who has been forced to appear at an interview is "compelled" to testify only if he is made to answer questions in spite of his invocation of his Fifth Amendment privilege. In Murphy, the respondent sought to suppress incriminating statements he had made during a meeting with his probation officer that he had been required to attend. Rejecting his argument that his testimony had been compelled within the meaning of the Fifth Amendment, the Court stated:

> We note first that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within

> the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

Murphy, 465 U.S. 420, 427 (1984).

Like Murphy, Cox was under a general obligation, pursuant to the BISHCA subpoena, to appear and answer questions truthfully.[7] There is no indication that Cox attempted to assert his Fifth Amendment privilege during the deposition, much less that he was required to answer despite such an assertion. In light of the Supreme Court's holding in Murphy, Cox's argument that his entire testimony was "compelled" must be rejected. See United States v. Plummer, 941 F.2d 799, 803 (9th Cir. 1991) ("The appellant makes much of the fact that the grand jury subpoena 'compelled' his appearance and testimony. However, . . . the appellant's testimony is not compelled unless he first asserts his Fifth Amendment privilege and the government then chooses to have the court require his testimony anyway."). It follows that because Cox's statements were not compelled as that term is used in Nanni and Kastigar, BISHCA was under no obligation to grant Cox immunity.

Regardless of whether the state was obligated to immunize Cox, it could have granted him "informal" immunity in exchange for his cooperation and testimony. United States v. Pelletier,

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[7] Although Cox makes much of Peterson's acknowledgment that the subpoena would "compel" Cox's testimony, see Tr. of Hearing on Mot. to Quash at 28-29, it is fair to assume that Peterson was referring only to this general obligation.

898 F.2d 297, 301 (2d Cir. 1990). The effect of such an agreement is "strongly influenced by contract law principles," although "[u]nlike the normal commercial contract, . . . due process requires that the government adhere to the terms of any plea bargain or immunity agreement it makes." Id. at 301-02.

Unfortunately for Cox, however, there is no evidence of an informal immunity agreement in this case. There no indication that Cox and BISHCA personnel had any discussions regarding immunity, much less that they reached any agreement, either written or oral.

Cox relies heavily on the representations made by Peterson at the April 2, 2002 hearing, as evidence that BISHCA granted him immunity. Cox, of course, was not even present at that hearing, which involved a dispute between BISHCA and Fletcher Allen. Even leaving that aside, however, Peterson's statements fell far short of indicating any intent to grant immunity. His representation that "Mr. Cox has no exposure from the Banking and Insurance Department" was by its own terms limited to BISHCA. Even assuming that Peterson was empowered to limit Cox's exposure to prosecution by the criminal authorities, the quoted statement plainly did not purport to do so. Cox also cites Peterson's statement that Cox's testimony would have "nothing to do with criminal activity." While that statement evidently turned out to be an inaccurate prediction, it in no way represented an

inclination to grant immunity. If anything, Peterson's words suggested that BISHCA saw no need for a grant of immunity because it was under the belief that the matter was a purely civil one.

In short, there is simply no evidence that BISHCA granted Cox any sort of immunity from future criminal prosecution in exchange for his testimony. Although Cox could have asserted his Fifth Amendment rights during the deposition, he chose not to. For these reasons, there is no basis for suppression of Cox's deposition testimony. In addition, given the Court's conclusion as to this matter, it is unnecessary to consider Cox's argument that the Indictment should be dismissed because it was obtained based on his testimony to BISHCA.

B. Cox's motion to suppress interview testimony

Cox moves to suppress the testimony he gave during his interview with AUSA Drescher and others on August 20, 2002, arguing that he was coerced into testifying by the threat of revocation of his severance payments. He also argues, as he did in relation to the BISHCA testimony, that the entire Indictment must be dismissed because the government relied on the interview testimony to conduct its criminal investigation.

As noted above, Fletcher Allen's severance payments to Cox were contingent on, among other things, Cox's certification in Section 7.02 of the Severance Agreement that he had not violated certain laws and regulations and that he was not aware of any

violations by others. Noting that two Fletcher Allen attorneys were present at the interview, Cox argues that if he had exercised his Fifth Amendment privilege against self-incrimination by refusing to answer questions at the August 20 interview, Fletcher Allen would have accused him of breaching Section 7.02 and sought to revoke his severance payments. Cox emphasizes the fact that Fletcher Allen acted aggressively on other occasions to enforce the Agreement. For these reasons, Cox argues, he was economically coerced into waiving his Fifth Amendment rights, and his interview testimony cannot be considered voluntary.

Cox's economic coercion theory is based on Garrity v. New Jersey, 385 U.S. 493 (1967). In Garrity, certain police officers had been informed that if they exercised their Fifth Amendment rights and refused to testify in an investigation into alleged police misconduct, they would lose their jobs. They chose to testify and were convicted based on their testimony. Reversing the officers' convictions, the Supreme Court held that because they had been forced to choose "either to forfeit their jobs or to incriminate themselves," their statements could not be considered voluntary. Garrity, 385 U.S. at 497 (citing Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)). As Garrity and subsequent cases have made clear, "[t]he state is prohibited . . . from compelling a statement through economically coercive

means, whether they are direct or indirect." United States *ex rel.* Sanney v. Montanye, 500 F.2d 411, 415 (2d Cir. 1974).

Cox argues that like the officers in Garrity, he faced a choice between "the rock and the whirlpool," Garrity, 385 U.S. at 498, i.e., between waiving his rights or losing payments that were vital to his livelihood. An examination of the facts in this case reveals no indication, however, that Cox faced a comparably dire choice.

As an initial matter, the record is devoid of any evidence that Cox actually felt coerced to answer the government's questions. Although he states in his motion that he faced a coercive situation, he has not presented any evidence, whether in the form of an affidavit or testimony in court, as to his actual state of mind during the interview. Because the ultimate issue in applying Garrity is whether the individual's testimony was given voluntarily, see Garrity, 385 U.S. at 497, the absence of evidence that Cox felt coerced casts doubt on the validity of his contention.

Moreover, the circumstances surrounding the interview demonstrate that Cox was not placed in a coercive situation by the government, by Fletcher Allen, or by any other party. Cox could have avoided his purported dilemma entirely simply by refusing to participate in the interview. Unlike with the BISHCA deposition, he had not been subpoenaed to appear. At the

beginning of the interview, Mr. Drescher confirmed that "we understand that you have agreed to voluntarily sit down with us." Cox himself concedes that he had the option of "refusing to be interrogated at all." Reply to Opp. to Mot. to Suppress at 3 (Doc. 45). He goes on to assert, however, that choosing this option would have placed his severance payments in jeopardy. Given that Cox could have refused to be interviewed for any number of reasons, including many unrelated to any sort of criminal activity, it is unclear how Fletcher Allen could have seized on such a refusal as evidence that Cox had violated Section 7.02 of the Agreement.

Moreover, even if Cox had been forced to attend the interview, his argument of coercion relies on the questionable premise that Fletcher Allen would have perceived his invocation of the Fifth Amendment as a breach of the Severance Agreement. It is true that Fletcher Allen had considered suspending Cox's severance payments in the past. Even if this is evidence of an aggressive approach to enforcement of the Agreement, however, the plain text of the Agreement suggests that it would have been difficult for Fletcher Allen to assert a breach based on the interview. The Agreement merely required Cox to warrant that he had "complied with all Federal and State laws and regulations *applicable to the payment and reimbursement of claims for hospital and/or professional services*, including but not limited

to the Social Security Act." Severance Agreement § 7.02 (emphasis added). The August 20 interview was part of an investigation into potential wrongdoing in connection with state approval of a construction project; it had nothing whatsoever to do with alleged violations of the laws governing claims for hospital or professional services. For this reason, it is unclear how Fletcher Allen could have perceived Cox's refusal to answer questions as an indication that he or anyone else had violated the laws and regulations referenced in Section 7.02.

Finally, even if Cox were justified in assuming that Fletcher Allen would have read the Agreement as broadly as he asserts, his position suffers from a more fundamental flaw. Assuming for the sake of argument that Cox was aware of crimes committed by himself or others, he would almost certainly have placed his severance payments in greater jeopardy by testifying, rather than by remaining silent. Whereas invoking his Fifth Amendment rights could theoretically have raised suspicions about possible illegal activity, openly admitting such activity would have given Fletcher Allen a considerably stronger case for claiming a breach of the Agreement. Accordingly, Cox's argument that he was coerced into waiving his rights is simply not logical; the incentive created by the Agreement was an incentive *not* to testify.

The police officers in Garrity were directly presented with

the stark choice between incriminating themselves or losing their livelihoods. As the above discussion makes clear, Cox was faced with no such choice. He had the option of declining to be interviewed at all. Once he did attend the interview, he need not have worried about invoking his Fifth Amendment rights, because the Severance Agreement did not even appear to reference the type of criminal activity that the government was investigating. And finally, to the extent that the Agreement gave Cox an incentive, it encouraged him to invoke his right against self-incrimination, not to waive it. Given these facts, and in light of the lack of any evidence that Cox actually felt pressure to answer the government's questions, Cox's economic coercion argument must be rejected. He is not entitled to suppression of his interview testimony, nor is he entitled to dismissal of the indictment.

VI. COX'S MOTION TO TAKE DEPOSITIONS

In the course of their investigation, the AUSAs assigned to this case, Michael Drescher and Paul Van de Graaf, have conducted numerous interviews with potential witnesses. Many of the interviews were attended by investigative agents, whose customary practice is to prepare summary memoranda or notes recording the substance of the witnesses' testimony. The government has acknowledged, however, that a certain number of interviews took place with no agents present. Consequently, agent notes or

summaries do not exist for all of the interviews. Cox argues that the lack of notes will compromise his ability to defend himself, because he will be unable to determine whether witnesses have changed their testimony between their interviews and their appearance at trial. For this reason, Cox argues, the only way he can be assured of a fair trial is to take depositions of AUSAs Drescher and Van de Graaf, at which he can inquire into what the witnesses stated at their interviews. Cox seeks an order compelling Drescher and Van de Graaf to submit to depositions.

Cox's argument begins with the uncontroversial notion, discussed in greater detail later in this opinion, that the government is obligated to disclose all exculpatory and impeachment evidence in its possession. See Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 153-55 (1972). The government does not dispute that it must disclose any material inconsistencies in a witness's testimony, whether those inconsistencies appear in an agent summary, an audio or video recording, or merely in the memories of those present at the interview. The government has undertaken, as indeed it must, to turn over any relevant impeachment evidence of which it becomes aware.

Cox goes on to express a more sweeping view of the government's obligations, however. In his view, the government must disclose what happened during all of its witness interviews-

-if not by turning over agent notes, then by submitting to depositions--so that he and the Court can be satisfied that no impeachment material lurks within. Having failed to ensure that note-taking agents were present at certain interviews, he argues, the AUSAs have essentially transformed themselves into defense witnesses, because they are the only source of information about what happened at those interviews.

There is no authority for the extraordinary relief that Cox seeks. He relies in part on Fed R. Crim. P. 15(a)(1), which provides that "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial." This rule is inapposite, however. As an initial matter, AUSAs Drescher and Van de Graaf do not qualify as "prospective witnesses" merely because they took part in witness interviews. If this were the law, prosecutors could be deposed and called to the stand in virtually any criminal prosecution.

Furthermore, "[t]he purpose of Rule 15(a) is to preserve testimony for trial, not to provide a method of pretrial discovery." United States v. Kelley, 36 F.3d 1118, 1124 (D.C. Cir. 1994). Rule 15 permits a court to order depositions only in "exceptional circumstances," which courts have uniformly found to be present only when the deponent is unavailable to testify. See, e.g., United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999) ("It is well-settled that the 'exceptional circumstances'

required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial."); Kelley, 36 F.3d at 1125 (describing materiality and unavailability as "[c]ritical factors" toward meeting the 'exceptional circumstances' burden). While Cox correctly points out that cases such as Gigante do not explicitly rule out the possibility that "exceptional circumstances" could be unrelated to unavailability, the text of Rule 15 could not be more explicit in stating that its purpose is to "preserve testimony for trial."

Nor can Cox rely on broader notions of constitutional law to support his request for depositions. His right to disclosure of exculpatory and impeachment evidence is well established by Brady, Giglio, and their progeny. Nothing in that line of cases, however, suggests that prosecutors must submit to depositions based solely on a defendant's speculation that they are suppressing knowledge of inconsistent witness statements. If Cox had evidence of government misconduct or a pattern of suppression, he would have a stronger case. The government's failure to supply agents for every witness interview, however, is explained at least in part by the fact that this long and complex investigation began as a civil matter and developed into a criminal case as facts continued to emerge. In addition, courts have found that even a deliberate prosecutorial policy of

encouraging agents not to take interview notes, while not necessarily a practice to be encouraged, does not rise to the level of prosecutorial misconduct. See, e.g., United States v. Houlihan, 92 F.3d 1271, 1291 (1st Cir. 1996).

For these reasons, Cox's motion to compel depositions of AUSAs Drescher and Van de Graaf must be denied.

VII. COX'S MOTIONS FOR DISCLOSURE OF EXCULPATORY EVIDENCE

Cox has filed two motions seeking disclosure of exculpatory and impeachment evidence in its possession, pursuant to its obligations under Brady v. Maryland. In his initial motion, he argues that due to the massive volume of evidence in this case, the government should be required to identify with specificity the exculpatory material contained in the discovery that it has provided to Cox. In a supplemental motion, he seeks disclosure of evidence that led the government to abandon the allegations in Count Four of the original Indictment, as well as a list of interviews conducted by AUSAs outside of the presence of agents.

A. The government's *Brady* obligations

Under Brady, "the government is constitutionally obliged to disclose evidence favorable to the accused when such evidence is material to guilt or punishment." United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002). Disclosure of Brady material must be made "in time for its effective use at trial." Id. at 106. In order to overturn a conviction as a result of a Brady violation,

a defendant must satisfy the following three elements: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Leka v. Portuondo, 257 F.3d 89, 98-99 (2d Cir. 2001).

It is important to note that the government's obligation extends only to "material" evidence, not evidence with only marginal exculpatory value. See United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001) (distinguishing "material in the Brady context" from "material in the evidentiary sense" and defining the latter as having "some probative tendency to preclude a finding of guilt or lessen punishment"). As the Supreme Court has explained, evidence is material for purposes of Brady

> if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. 667, 675-76 (1985).

Because the existence of a Brady violation can only be determined with reference to the outcome of the trial, "the scope of the government's constitutional duty--and, concomitantly, the scope of a defendant's constitutional right--is ultimately defined retrospectively[.]" Coppa, 267 F.3d at 140. For this reason, the Court cannot define the precise disclosures to be

made at this stage of the proceedings. The Court emphasizes, however, that the government has an obligation to assess each piece of potentially exculpatory evidence and to "make a careful prediction as to when the point of reasonable probability is reached" and disclosure becomes required. Id. at 143. In making this prediction, the government should err on the side of disclosure. See id. ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."); United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (warning that "[t]he prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial"). It also bears emphasis that Brady disclosures should generally be made as early as possible. See Gil, 297 F.3d at 106 (noting that when "a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired"). With these principles in mind, the Court considers Cox's requests.

B. Cox's request for specific identification of exculpatory documents

Cox's first motion for Brady disclosure does not focus on whether the government has failed to disclose exculpatory material in its possession. Instead, Cox argues that the discovery that the government has already turned over to him,

consisting of approximately 2 million pages[8] of electronic documents and numerous boxes of unscanned documents, is so voluminous that he is unable to ensure that he has located all Brady material within it. Proceeding on the assumption that there must be some exculpatory evidence among the 2 million pages, Cox suggests that the government's "method of scattering needles of exculpatory material in the haystacks of discovery renders its 'disclosure' a nullity." Doc. 17 at 3. He has presented the government with a lengthy list of examples of potentially exculpatory information that, in his view, should be pinpointed in the government's disclosures. See Letter of Stephen Huggard, Ex. A to Doc. 17 (setting forth 29 separate requests, such as "[a]ny information tending to show that David Cox did not join the alleged conspiracy").

The case law makes clear that the adequacy of Brady disclosure is a function of a number of factors, including the timing of the disclosure and the ease of locating the exculpatory material. As the Second Circuit has repeatedly emphasized, "Brady material must be disclosed in time for its effective use at trial." Gil, 297 F.3d at 106; Coppa, 267 F.3d at 140. In addition, disclosure may be inadequate if the exculpatory

[8] Cox's motion for disclosure indicated that the government had disclosed approximately 1.4 million pages of material. At oral argument, counsel for Cox represented, and the government did not dispute, that this number has subsequently increased to at least 2 million pages.

material is difficult to locate because it is contained within a large volume of non-exculpatory or irrelevant documents. See Gil, 297 F.3d at 106.

In Gil, on which Cox primarily relies, the Second Circuit found a Brady violation based on a combination of the two aforementioned factors. One or two days prior to trial, the government had turned over a two-page memo containing important exculpatory material as part of an undifferentiated mass of "five reams of paper labeled '3500 material.'" Id. Holding that this disclosure was so inadequate as to amount to government suppression, the court noted that "the defense was not in a position to read [the exculpatory document], identify its usefulness, and use it." It stressed both the fact that disclosure was made "on the eve of trial" and that "[t]he two-page memo was not easily identifiable as a document of significance, located as it was among reams of documents[.]" Id.

This case differs from Gil in two important ways, each of which cuts in the opposite direction. On one hand, the voluminous disclosure that Cox has received arrived many months ago, as opposed to on the eve of trial. On the other hand, the disclosure is larger than Gil's five reams of paper by several orders of magnitude. On balance, the Court concludes that the latter factor is of greater importance. Because Cox has received such an enormous volume of discovery, there is a very real

possibility that he will be unable to comb through the material for exculpatory information, even with the benefit of several months' time. As Cox points out, if he were to review each of the disclosed pages for only one minute, it would take him well over two and one half years, working 24 hours per day. If there is exculpatory information located within the undifferentiated mass of discovery that Cox has received, there is a significant risk that he will be unable to locate it "in time for its effective use at trial," id.

Consequently, the Court agrees with Cox that the government should be obligated to draw Cox's attention to any specific information, regardless of whether it has previously been disclosed, that is likely to be "material" for purposes of Brady. That having been said, it bears repeating that "'material' in the Brady context does not mean material in the evidentiary sense." Coppa, 267 F.3d at 141. Many, and arguably most, of the requests in Cox's letter are overbroad. While the requested material, to extent that it exists, may have some marginal exculpatory value, the government need not specifically identify any information unless it is material in the Brady sense, i.e., if there is a reasonable possibility that its suppression would "undermine[] confidence in the outcome of the trial." Id.[9] For this reason,

[9] The process that the government must follow in identifying materially exculpatory evidence is well illustrated by the Second Circuit's hypothetical examples in Coppa:

the Court will not order the government to comply specifically with Cox's list of requests or to read each of the 2 million pages in order to find material that may be marginally favorable to Cox.

The Court will, however, order the government to undertake a careful review of the material in its possession, whether previously disclosed or not, and identify with specificity any evidence that is sufficiently exculpatory to be material for Brady purposes. The Court is particularly concerned about any exculpatory evidence or inconsistent statements that may have emerged during witness interviews, given that many witnesses were apparently interviewed multiple times and given that notes were not taken at all of the interviews. For this reason, the government's review of its interview evidence must be especially

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> For example, if there are three eyewitnesses who have told investigators that the perpetrator is someone other than the defendant, there will almost always be a reasonable probability that the disclosure of such evidence would have resulted in a different outcome from a trial at which it was not disclosed, regardless of the strength of the prosecution's evidence. At the other extreme, an item of evidence with some arguably exonerating effect might be so trivial in significance to the entire trial evidence that there is no reasonable probability that its disclosure would have altered the outcome. But much evidence favorable to a defendant will lie between these extremes, obliging prosecutors to make a careful prediction as to when the "point of 'reasonable probability' is reached." Of course, as the Supreme Court has pointed out, a prosecutor "anxious about tacking too close to the wind will disclose a favorable piece of evidence."

Coppa, 267 F.3d at 143 (citations omitted).

diligent. Such a review will necessitate consulting with agents, AUSAs, and other individuals who were present at interviews, and ensuring disclosure of any memories, recollections, documentation, or other indications of inconsistent or otherwise exculpatory statements.

C. Cox's supplemental request for *Brady* disclosures

In his supplemental motion for disclosure of exculpatory and impeachment evidence, Cox repeats his request that the government be ordered to disclose and specifically identify Brady material in its possession, and he makes two specific requests. First, he seeks disclosure of any evidence that led the government to abandon its prosecution of Count Four of the original Indictment; second, he seeks a list of all witnesses who were interviewed by government prosecutors without agents present.

Cox's first request stems from the fact that the Superseding Indictment omitted the allegations from Count Four of the original Indictment and replaced them with allegations relating to a separate matter. Cox argues that the government must have abandoned the original charge because it has discovered evidence that Cox did not actually commit the crime alleged therein. In Cox's view, this evidence, whatever it may be, is likely to cast doubt on the allegations in the remaining counts of the Indictment, including the allegation that he was involved in a conspiracy and the allegations of false statements and

concealments. For this reason, he argues, the evidence that led the government to abandon Count Four is exculpatory and must be disclosed.

Cox's argument is too speculative to warrant an order compelling the government to disclose its reasons for obtaining a new indictment. Cox relies on two questionable assumptions. First, he assumes that the government must have modified Count Four because it discovered that it could not obtain a conviction on that count. While this is one possibility, the government could have changed its mind for many reasons, such as a desire to redirect prosecutorial resources toward other matters. Second, Cox assumes that any evidence undermining the allegations in Count Four would necessarily undermine other allegations in the indictment. Even if the government did discover a weakness in its case as to Count Four, that weakness might be entirely unrelated to the other counts.

To be sure, if the government abandoned Count Four after discovering evidence that is materially exculpatory as to other counts, Brady requires disclosure of that evidence. This Court cannot order disclosure based on mere speculation, however. Unless and until Cox can demonstrate a significant probability that materially exculpatory evidence is being suppressed, the obligation to identify and disclose Brady material rests with the government.

Cox's second request is for a list of interviews conducted outside of the presence of agents. This request, which is related to Cox's motion to take depositions, is also based purely on speculation. Cox theorizes that some of the individuals who took part in these interviews may have made inconsistent or exculpatory statements. Because there are no notes recording the substance of these individuals' testimony, he argues, he is entitled to a list of their names so that he can investigate whether the government is withholding impeachment or exculpatory material.

The list of names that Cox requests obviously does not constitute exculpatory material in and of itself. Moreover, there is no indication that disclosure of the list would lead to the discovery of exculpatory evidence. Cox can point to nothing more than the theoretical possibility that individuals who were interviewed without agents present may have made exculpatory or inconsistent statements. The Court has already instructed the government to undertake a careful review of its evidence relating to interviews. Without actual evidence that the government is suppressing knowledge of materially exculpatory statements, however, the Court has no basis for granting Cox's request of a list of interviewees.

CONCLUSION

For the foregoing reasons, Cox's motions to dismiss Counts One through Four, Counts Two and Three, Count Four, and Count Five, are DENIED. Cox's motion for a bill of particulars is DENIED. Cox's motions to suppress his BISHCA deposition testimony and his interview testimony, and to dismiss the indictment, are DENIED. Cox's motion to take depositions is DENIED. Cox's motion for disclosure of exculpatory evidence is GRANTED in part and DENIED in part. Cox's supplemental motion for disclosure of exculpatory evidence is DENIED.

Dated at Burlington, Vermont this 28th day of March, 2006.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge